IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S REPLY TO DEFENDANTS' JOINT RESPONSE TO PLAINTIFFS' [sic] MOTION IN LIMINE TO PRECLUDE EXPERT TESTIMONY OF DEFENDANTS' WITNESS JAY CHURCHILL

The State of Oklahoma ("the State") respectfully submits the following reply to "Defendants' Joint Response to Plaintiffs' [sic] Motion in Limine to Preclude Expert Testimony of Defendants' Witness Jay Churchill" ("Response") (Dkt. #2140):

Introductory Statement

In their Response, Defendants use phrases like "hyper-technical" and "hypercritical word play" to describe the State's Motion in Limine to Preclude Expert Testimony of Jay Churchill ("Motion"). Response at 3 and 9. Defendants refer to the State's arguments as "straw-man" arguments. *Id.* at 12. Defendants repeat Mr. Churchill's unfounded comment made during the preliminary injunction hearing that the Camp Dresser & McKee ("CDM") sampling personnel "appeared to be rookies." *Id.* at 14. Defendants claim CDM was "careless" and that the State's sampling program was "poorly executed." *Id.* at 17. Despite all of this overly-aggressive language, Defendants' Response provides little in the way of substance.

Far from "hyper-technical," the State's Motion is straightforward and based on hard facts. *See* Dkt. #2058, *passim.* Indeed, much of the Motion is built around extensive and direct quotes

from Mr. Churchill's own sworn testimony. Defendants' Response cannot mask these facts which show that: (a) Mr. Churchill lacks the pertinent experience and qualifications to render any admissible opinion regarding CDM's sampling program performed in this case; and (b) Mr. Churchill does not have an adequate, reliable basis upon which to opine regarding data he has never seen or "industry standards" that have never been documented. The State's Motion should be granted.

Discussion

A. Mr. Churchill Lacks the Necessary Qualifications to Answer the "Specific" Question Presented

Defendants claim that Mr. Churchill's qualifications are "impeccable" and criticizes the State for allegedly failing to discuss Mr. Churchill's training and experience in the Motion. Response at 5-6. However, the State's Motion includes an extensive discussion of Mr. Churchill's pertinent experience taken directly from Mr. Churchill's own testimony. Motion at 2-3 & 8. What this evidence shows is that Mr. Churchill lacks the necessary experience to opine regarding the adequacy of the sampling program because he has never conducted the type of field investigation that CDM conducted in this case. For example, Mr. Churchill has testified that he has: (1) never conducted environmental sampling concerning nonpoint source contamination;[1] (2) never conducted any environmental sampling for the purposes of investigating the presence of nutrients or bacteria; (3) never taken an edge of field sample of any

[1] As Defendants note, Mr. Churchill has since attempted to alter -- through an errata sheet -- his original substantive testimony by giving a contrary answer on the "nonpoint" issue. *See* Dkt. #2140-5 (Page 31, line 25). In the errata sheet, Mr. Churchill provides *no* explanation for this change. *Id.* This sort of substantive change to deposition testimony is not condoned in the Tenth Circuit. *See Garcia v. Pueblo Country Club,* 299 F.3d 1233, 1242, fn 5 (10th Cir. 2002) ("We do not condone counsel's allowing for material changes to deposition testimony and certainly do not approve of the use of such altered testimony that is controverted by the original testimony.") (citations omitted). Thus, Mr. Churchill's substantive unexplained alternation of his original testimony is improper and should be disregarded by the Court.

kind; and (4) never implemented soil sampling Standard Operating Procedures ("SOP"). *Id.* Furthermore, when asked, Mr. Churchill could not even remember the last time he had taken a soil sample. Dkt. #2058-3 (Churchill Depo. at 50:11-13).

Contrary to his seemingly wide-ranging criticism of CDM's sampling program and data, Mr. Churchill is only opining about a fraction of the overall program. *See* Ex. A (Churchill Depo. at 67:13-73:5). Conestoga Rovers and Associates ("CRA") -- Mr. Churchill's employer -- only observed aspects of CDM's soil and litter, spring sampling and residential well sampling programs. *Id.* at 72:3-9. And CRA only observed CDM taking four out of fifty-seven total spring samples that were taken and only six residential well samples. *Id.* at 72:14-73:5. Thus, overwhelmingly, Mr. Churchill's criticisms involve the State's soil and litter sampling program.

The State's allegations against Defendants in this case all pertain to non-point source nutrient and bacteria contamination stemming from the land application of poultry waste. Thus, the soil and litter sampling conducted by CDM was for the purposes of investigating the presence of nutrients and bacteria, including the propensity for nonpoint source pollution. Mr. Churchill has *no* experience with this type of an investigation -- *none*. And whatever general experience he has with soil sampling with respect to *any* constituent is limited at best. It is Defendants' position that Mr. Churchill does not need such specific experience in order to be qualified to condemn the State's soil and litter sampling program in this case. According to Defendants, the fact that Mr. Churchill is an engineer with experience in the environmental field is good enough. Defendants argue that Mr. Churchill's opinions in this case are within the "'reasonable confines' of his expertise . . . ." Response at 8. This argument should be rejected.

The Tenth Circuit's decision in *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 (10th Cir. 2001), is on point. In *Ralston*, the plaintiff asserted that warnings accompanying a

certain implanted orthopedic nail were inadequate. The Tenth Circuit affirmed the trial court's exclusion of the testimony of plaintiff's expert, a board-certified orthopedic surgeon and associate professor of medicine at the University of Kansas Medical School. The expert's *general* credentials were not in question, but she had done no research "specifically looking at this nail," *id.* at 969, and had not drafted a warning for a surgical device. *Id.* Despite her seemingly stellar general qualifications, the Court held that "[m]erely possessing a medical degree is not sufficient to permit a physician to testify concerning any medical-related issue." *Id.* at 970. The board-certified orthopedic surgeon's "reliance upon general principles and concepts" did not suffice. *Id.*

Similarly, merely being an engineer with environmental experience is not sufficient to permit such an engineer to testify concerning *any* environmental sampling-related issue. Here, Mr. Churchill's total lack of specific experience is akin to the orthopedic surgeon in *Ralston.* Mr. Churchill does not have the specific qualifications necessary to render his broad, sweeping opinions with respect to the State's sampling program. Mr. Churchill should not be permitted to condemn as inadequate a sampling effort unlike anything he has actual experience with.

B. Mr. Churchill's Opinions Concerning the State's Sampling Data and Results are Unreliable

Clearly, Mr. Churchill is highly critical of the State's sampling effort. Defendants spend much of their Response discussing those criticisms. It is just as clear, though, that Mr. Churchill's criticisms are unfounded and that CDM has convincingly addressed all of Mr. Churchill's claims. *See, e.g.,* Dkt. #2058-7 (Brown Aff., 2/29/08). There is no need to engage in a full argument over each of Mr. Churchill's misguided allegations here. And Defendants' effort to catalogue Mr. Churchill's alleged observations only shows that they have missed the point of the State's Motion. That is, the State does not dispute that if relevant, Mr. Churchill could be

permitted to testify as to what he claims to have *witnessed* in observing the State's sampling program.

Even if the Court concludes that Mr. Churchill has adequate qualifications to give *opinion* testimony in this case, he should not be permitted to opine about the reliability or adequacy of the State's sampling data or results. Again, as shown throughout the State's Motion, Mr. Churchill has no idea what the State's sampling data looks like or what the results were. Mr. Churchill has never reviewed -- let alone analyzed -- any of those results. Without knowing anything about what the actual data results are, it is axiomatic that Mr. Churchill can not reliably opine as to what -- if any -- impact his alleged observations had on the reliability of the data. A perfect example of the inherent unreliability of Mr. Churchill's opinions is Mr. Churchill's testimony concerning spring sampling and his alleged observation of "suspended sediment":

> Q. Okay. You've also been critical of CDM for certain spring sampling activities; correct?
> A. That's correct.
> Q. Specifically you claim that certain spring samples contain suspended sediments; correct?
> A. Correct.
> Q. Did you examine any of the actual spring sampling data?
> A. No, I did not examine the data.
> Q. So you don't know whether the spring sampling data showed the presence of suspended sediment?
> A. You don't need to review data to observe that water samples were collected from areas with suspended sediments.
> ***
> Q. . . . I'm just asking you a simple question of whether you know whether any of the spring sampling data showed the presence of suspended sediments. Do you know?
> A. No, ***I don't know if the data showed that***. I know my eyes showed that.

Dkt. #2058-3 (Churchill Depo. at 204:23-205:21) (emphasis added). To extend this type of alleged observation into an opinion about the reliability of data is not "methodology" as Defendants assert -- it is guess work. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509

U.S. 579, 590 (1993) (knowledge "connotes more than subjective belief or unsupported speculation.").

Still, Defendants argue that it is permissible for Mr. Churchill to condemn data he has never seen because Mr. Churchill has broadly opined that "[c]ompliance with industry standards, EPA guidance documents, SOPs or other consistent, objective protocols is essential 'in order to obtain accurate, representative data.'" Response at 13 (quoting from Dkt. #2058-2 at 21). If qualified by the Court, perhaps Mr. Churchill could permissibly testify as to his opinion that his alleged observations amount to noncompliance with certain verifiable standards or SOPs. But it must be left to someone who has actually seen and analyzed the data to "connect the dots" and opine as to whether Mr. Churchill's alleged observations in the field had any actual impact in the lab.[2] Overall, there is simply too great an analytical gap between the data -- to the extent that alleged observations are even "data" at all -- and the opinion proffered. *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 886 (10th Cir. 2005). Mr. Churchill's opinions as to the data results should be precluded.

C. Mr. Churchill's Opinions Concerning Unverifiable "Industry Standards" Are Unreliable

[2] Defendants' citation to a question asked by counsel for the State during cross-examination of Mr. Churchill proves nothing. Response at 17 (citing P.I. Hrg. Tr. at 1060:19-23). A simple review of the context of Mr. Churchill's testimony reveals that counsel first elicited Mr. Churchill's admission that CRA had done no sampling of its own to determine whether different "sampling methods" would make any material difference in the results. P.I. Hrg. Tr. at 1060:10-18. Thus the question relied upon by Defendants was asked in the context of whether analysis of a split sample would reveal anything about whether a different sampling method would have any measurable impact on the results. This has no bearing on whether sampling results would confirm or negate the type of sample corruption that Mr. Churchill complains of (*e.g.*, spring samples containing suspended sediment or litter samples containing soil). Clearly, analytical review of such sampling results is a much more reliable method of making this determination than Mr. Churchill's "eye ball" method.

Defendants offer no valid justification for allowing Mr. Churchill's opinions as to undocumented and unverifiable "industry standards." *See* Response at 18-20. "Even if expert testimony on the ordinary practices of a profession or trade were appropriate 'to enable the jury to evaluate the conduct of the parties against the standards of ordinary practice in the industry,' . . . it still must comport with the reliability and helpfulness requirements of Rule 702." *In re Rezulin Products Liability Litigation,* 309 F.Supp.2d 531, 543 (S.D.N.Y. 2004) (quoting *Marx & Co., Inc. v. Diners' Club, Inc.,* 550 F.2d 505, 509-10 (2d Cir. 1977)). Defendants attempt to support Mr. Churchill's unverifiable "industry standards" opinions by claiming that they are "common sense" standards. *Id.* at 19. However, such alleged "common sense" standards -- without more -- are not admissible under Rule 702. *See Grdinich v. Bradlees,* 187 F.R.D. 77, 81 (S.D.N.Y. 1999) (excluding expert opinion allegedly based on industry standards as unsupported speculation where only bases for standard were general "common-sense" guidelines.) For these reasons, Mr. Churchill's opinions concerning undocumented and unverifiable "industry standards" should be precluded.

WHEREFORE, premises considered, the State respectfully requests that the Court grant its Motion in Limine to Preclude Expert Testimony of Jay Churchill over the Defendants' objections.

Respectfully submitted,

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